Matter of Belardi-Ostroy, Ltd. v American List Counsel, Inc.
2016 NY Slip Op 30727(U)
April 14, 2016
Supreme Court, New York County
Docket Number: 654327/2015
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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In the Application of

BELARDI-OSTROY, LTD.,

Petitioner,

-against-

AMERICAN LIST COUNSEL, INC.,

Respondent,

For an Order Pursuant to Limited Liability Company Law § 702 Dissolving

BELARDI/OSTROY ALC, LLC.

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Index No.: 654327/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Belardi-Ostroy, Ltd. (Belardi-Ostroy) filed this petition to dissolve Belardi/Ostroy ALC, LLC (the Company) pursuant to New York Limited Liability Company Law (LLCL) § 702. Respondent, American List Counsel, Inc. (ALC), opposes and cross-moves to dismiss the petition. For the reasons that follow, the petition is denied and ALC's motion to dismiss is granted.

I. Background & Procedural History

The material facts are not in dispute in this New York action.[1]

On December 21, 2015, Belardi-Ostroy filed the instant petition to dissolve the Company on the ground that it is not reasonably practicable to carry on the business. The Company, a "direct marketing customer list management brokerage advertising agency", is a New York LLC

[1] The court does not mean to suggest that the parties do not dispute material facts at issue in the New Jersey litigation. Rather, the facts relevant to the court's decision to dismiss this dissolution petition, discussed herein, are undisputed.

founded in 1997.[2] Belardi-Ostroy and ALC are its only members, each owning 50% of the equity.

ALC has been in the data marketing services industry since 1978. The Company was essentially a new division of ALC (albeit a separate legal entity), which was to be funded by ALC and operated by the principals of Belardi-Ostroy, Donna Belardi and Andrew Ostroy (who, at the time, worked in sales for a competitor). The parties are bound by a Support Services Agreement and a Member Agreement, and they have been litigating in New Jersey (pursuant to forum selection clauses) for several years.

The Company, however, is governed by an operating agreement dated December 19, 1997 (the Operating Agreement). *See* Dkt. 2.[3] The Operating Agreement is governed by New York law and, as this is a petition for dissolution, venue is proper in this court. The Operating Agreement provides that the Company is to be run by a 5-member board (the Board). *See* Dkt. 2 at 14-15. Belardi-Ostroy and ALC are each entitled to nominate two Board members (referred to as "Directors"), and the fifth Director must be "an individual mutually agreed to" by Belardi-Ostroy and ALC. *See id.* at 15. Until recently, the Board has been without a fifth Director since a December 14, 2011 meeting, when the fifth Director, Darryl Ross, resigned. Since Ross' resignation, Belardi-Ostroy has controlled the Company and refused to hold Board meetings or

[2] The Company was formerly known as "ALC of New York, LLC", and is referred to as such in the contracts discussed herein.

[3] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

agree on a fifth Director.[4] The parties' disputes and their merits have been (and continue to be) extensively litigated in New Jersey.

The impetus for this action was the New Jersey's court's December 2, 2015 order, issued after a hearing, appointing a fifth Director to the Board to resolve the parties' deadlock. *See* Dkt. 49 (12/2/15 Tr.). On January 22, 2016, the New Jersey court denied Belardi-Ostroy's motion for reconsideration. *See* Dkt. 51 (1/22/16 Tr.). The January 22 transcript demonstrates the New Jersey court's familiarity with the parties' disputes and grasp of the issues and provides the context for the instant petition:

> THE COURT: Pending before the Court is a motion for reconsideration and a motion for sanctions.
>
> The motion for reconsideration, I've had a chance to review all the moving papers. We have had extensive oral argument and case management conferences on this matter. The Court engaged in an extensive amount of process before entering an order appointing essentially a fifth member to the board of directors of the LLC.
>
> Briefly, Belardi-Ostroy, Limited and American List Counsel, Incorporated are two corporations. Belardi is a New York corporation, American List is a New Jersey corporation, came together and the two -- those two business entities then created a limited liability company under New York law, Belardi-Ostroy ALC, LLC.
>
> And their agreement said that they're supposed to be five members of the board, two appointed by Belardi, two by American List and then one neutral person or fifth person that is supposed to be jointly put into place.
>
> Well, eventually the fifth board member became absent from the board and the company went on to be run just by [Belardi-Ostroy], as I understand it. And so [ALC] wants a fifth board member so that they have the agreement they originally sought.
>
> When the case first came in[,] the Court declined to enter an order for a fifth board member and that it was New Jersey that allows the Court expressly to do it by statute. New York law doesn't appear to have had that.

[4] The court will not opine on the disputed removal of Directors because that issue is not relevant to this action.

But New York law, like New Jersey law, does allow for the formation of LLCs for the organization and efficient use of labor and resources, and it is the party's agreement that that should be done in this case, and New York law certainly would allow the formation of an LLC, as they've done here.

None of that appears to be -- the formation of an LLC by two corporations, the agreement of the parties are all not in dispute. It's just missing that additional board member.

Given that this was a business arrangement between business -- between corporations, at the outset of the case the Court assumed that it would be a relatively quick turnaround and that these are business people and that it's a business analysis to resolve the issues here.

But after many case management conferences, going through what it takes to appoint a fifth member, how is that done, the practicalities of paying them, picking one and how -- and who to select and what qualifications go through, an extensive amount of processing was employed, and ultimately it became clear that the running of this company, which is by agreement of the parties, is supposed to be done in the world of business by way of a board was simply not occurring and that the litigation was going on for an extensive period of time.

So the plaintiff, having had the advantage for so long before the litigation, during the course of litigation and there being no dispute about the fact that both states allow for LLCs and that both sides agree to have a five-member board, the Court entered an order for an interim director pending further litigation.

Then comes a motion to reconsider, and I read the motion to reconsider and I don't feel that it correctly and accurately recites the full record of the case here.

I do find that the opposition though did correctly cite to at least to the parts that were cited to, the history of the case or the way the decision came out was -- I did note that one of the arguments for the moving party is that the Court just relented after endless applications, and the other side responds that it's just the same old tired argument, and I suppose that belies some of the feelings of the attorneys.

The only thing I could add is that it was the length of the litigation that occurs -- that occurred to me that was being assumed at the beginning that turned out to be an assumption that was not true.

One of the things that was argued in the motion to reconsider, as it had been argued before though, was that by appointing a fifth member that could wind up resolving some of the issues in the litigation and that the party was arguing that shouldn't be the case.

> To the contrary, the Court has pointed out before and once again the Court hopes that it is exactly the case since the parties were agreeing to run this business by way of a business organization.
>
> The parties hadn't come to an agreement saying every time we have to have a vote we're going to go to court to get a fifth vote from a judge. This was supposed to be business decisions. Hopefully this will help to move the case along.
>
> ...
>
> In terms of the counter motion for sanctions, apparently there's some litigation going on in New York that was described as, quote, unquote, being bogus. The word bogus was used. **If that is, in fact, bogus, a bogus piece of litigation, it's not proper, then sanctions might very well be in order here, but the best way to know whether the New York case is or isn't bogus is for the New York Court where the case was filed to make that determination.**
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> **So the Court dismisses the motion for sanctions without prejudice pending the resolution of the New York case and preserving the filing date so that in the event that they're -- what they say is true, they can reinstate their motion and seek sanctions going all the way back to the time that they filed.**
>
> ...
>
> [A]t this point, unless something else develops, the Court here is satisfied to let the New York Court deal with the litigation that they have and take the appropriate action thereafter.

Dkt. 51 at 2-5 (1/22/16 Tr. at 2-7) (emphasis added).

Less than three weeks after the New Jersey court appointed the fifth Director, on December 21, 2015, Belardi-Ostroy commenced this action to dissolve the Company. On January 12, 2016, Belardi-Ostroy moved, by order to show cause, for a preliminary injunction prohibiting the Company from holding a Board meeting with the fifth Board member appointed by the New Jersey court. *See* Dkt. 11. By order dated March 4, 2016, this court denied that motion. *See* Dkt. 113. As explained on the record, the New Jersey court is intimately familiar with the parties' disputes and its order appointing the fifth Board member should not be disturbed. *See* Dkt. 114 (3/4/16 Tr.). Belardi-Ostroy's injunction motion was nothing more than

a collateral attack on the New Jersey court's ruling. Principles of comity and judicial efficiency militate heavily against countenancing such a tactic.

Thus, all that is left for this court to decide is whether, now that the Board has a tie breaking fifth member for the first time since 2011, is it reasonably practicable for the Company to operate its business? The answer, as discussed below, is yes, and Belardi-Ostroy's petition for dissolution is dismissed.

II. Discussion

In re 1545 Ocean Ave., LLC, 72 AD3d 121 (2d Dept 2010) (*1545 Ocean*), is the seminal Appellate Division case on dissolution under LLCL § 702. There, the court explained:

> LLCL 702 provides for judicial dissolution as follows:
>
> > "On application by or for a member, the Supreme Court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company *whenever it is not reasonably practicable to carry on the business* in conformity with the articles of organization or operating agreement" (emphasis added).
>
> ...
>
> Despite the standard for dissolution enunciated in LLCL 702, there is no definition of "not reasonably practicable" in the context of the dissolution of a limited liability company. Most New York decisions involving limited liability company dissolution issues have avoided discussion of this standard altogether
>
> Such standard, however, is not to be confused with the standard for the judicial dissolution of corporations. ... The grounds for judicial dissolution of a corporation are set forth in article 11 of the Business Corporation Law [or] ... Partnership Law §§ 62, 63.
>
> Limited liability companies thus fall within the ambit of neither the Business Corporation Law nor the Partnership Law. ... While there are no New York cases which interpret and apply this standard in the context of limited partnerships, it has been held to mean that, without more, disagreements between the partners with regard to the accounting of the entity are insufficient to warrant dissolution.

> The LLCL also clarifies its scope by defining "limited liability company" as "an unincorporated organization of one or more persons having limited liability ... other than a partnership or trust". Thus, the existence and character of these various entities are statutorily dissimilar as are the laws relating to their dissolution. ...
>
> However, LLCL 702 is clear that unlike the judicial dissolution standards in the Business Corporation Law and the Partnership Law, **the court must first examine the limited liability company's operating agreement to determine, in light of the circumstances presented, whether it is or is not "reasonably practicable" for the limited liability company to continue to carry on its business in conformity with the operating agreement. Thus, the dissolution of a limited liability company under LLCL 702 is initially a contract-based analysis.**

1545 Ocean, 72 AD3d at 126-28 (italics in original; bold added; citations omitted); *see Doyle v Icon, LLC*, 103 AD3d 440 (1st Dept 2013) (plaintiff's allegation that he has been systematically excluded from operation of LLC not sufficient to demonstrate that it is no longer reasonably practicable to carry on its business), citing *1545 Ocean*, 72 AD3d at 131.

A petition seeking dissolution under LLCL § 702 should be dismissed where, even if the petitioner's allegations are true, it is not the case "that 'the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible.'" *Kassab v Kasab*, 2016 WL 1125932, at *2 (2d Dept Mar. 23, 2016), quoting *1545 Ocean*, 72 AD3d at 131; *see Barone v Sowers*, 128 AD3d 484, 485 (1st Dept 2015) (dissolution denied since allegations in complaint did not show that defendant was unable or unwilling to reasonably permit or promote stated purpose of entity to be achieved and continuing of entity was not financially unfeasible).

Notably, the court in *1545 Ocean* looked to Delaware case law for guidance because Delaware's LLC dissolution statute (6 *Del C* § 18-802) is similarly worded to LLCL § 702. The

1545 Ocean court quoted extensively from a decision by then-Delaware Vice Chancellor (now Chief Justice) Strine, who provides a useful elucidation of the relevant inquiry:

> The court will not dissolve an LLC merely because the LLC has not experienced a smooth glide to profitability or because events have not turned out exactly as the LLC's owners originally envisioned; such events are, of course, common in the risk-laden process of birthing new entities in the hope that they will become mature, profitable ventures. In part because a hair-trigger dissolution standard would ignore this market reality and thwart the expectations of reasonable investors that entities will not be judicially terminated simply because of some market turbulence, **dissolution is reserved for situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.**

See 1545 Ocean, 72 AD3d at 130-31, quoting *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *2 (Del Ch 2009) (emphasis added).[5]

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[5] As is usually the case in the area of corporate law, the Delaware Court of Chancery has issued numerous thorough and thoughtful decisions in LLC dissolution cases. While such precedent is too extensive to recount here, and while this case is governed by New York law, two other Delaware cases are worth noting. First, in *Homer C. Gutchess 1998 Irrevocable Trust v Gutchess Cos.*, 2010 WL 718628, at *1 (Del Ch 2010), Vice Chancellor Noble explained that:

> In *Arrow Investment*, the Court suggested that in unusual circumstances, its equitable powers may be invoked even in the absence of deadlock, and despite a broadly defined business purpose. Thus, the Court reasoned that dissolution remained a possibility if the petitioner made a "convincing showing" that the entity's continued existence would be "obviously futile and would not result in business success." **The Court, however, prefaced this caveat by emphasizing the extreme nature of judicial dissolution, which it further described as a "limited remedy that [it] grants sparingly." The Court reiterated that judicial dissolution is reserved only for those situations when a company's management has grown dysfunctional, or its business purpose so frustrated, that its "defined purpose" has "become impossible to fulfill."**

(emphasis added). Second, in *Meyer Natural Foods LLC v Duff*, 2015 WL 3746283, at *4 (Del Ch 2015), Vice Chancellor Noble further reiterated the fact that *Arrow Investment* stands for the proposition that the court "must look to the operating agreement of the LLC to determine the purpose for which it was formed, and not to an initial business plan that any rational businessperson would expect to evolve over time." *See id.* n.4, citing *In re Seneca Invs. LLC*, 970 A2d 259, 263-64 (Del Ch 2008) ("This Court will also not attempt to divine some other

The *1545 Ocean* court dismissed the dissolution petition, *inter alia*, because the LLC's operating agreement provided for a means to avoid deadlock. *See id.* at 131-33. Here, the Company's LLC agreement does so as well, and the New Jersey court's recent appointment of a fifth, tie-breaking Director provides a path for management to reasonably permit or promote the stated purpose of the Company to be realized or achieved and for the Company to proceed profitably.

So long as Belardi-Ostroy does not violate the orders of this court and New Jersey court, a board meeting can take place and deadlock can be resolved by the newly appointed fifth Director. Deadlock, therefore, is not grounds for dissolution. Indeed, deadlock does not appear to be a ground the parties intended to result in dissolution because the Operating Agreement provides a straightforward means of avoiding deadlock – having a tie-breaking fifth member on the Board.

Most importantly, there is no basis to believe, even assuming the allegations in the petition to be true, that the stated purpose of the Company cannot be achieved or that the Company cannot feasibly turn a profit.[6] Rather, Belardi-Ostroy takes issue with ALC's business strategy which, in Belardi-Ostroy's view, should be more internet driven.[7] The court expresses no opinion on the matter, nor should it. The management decisions of a New York LLC made in good faith and with the proper exercise of business judgment cannot be second guessed by the

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business purpose by interpreting provisions of the governing documents other than the purpose clause."). This rule is notable given Belardi-Ostroy's arguments about how the industry has changed (primarily due to the internet) since the Operating Agreement was executed in 1997.

[6] ALC claims, and Belardi-Ostroy does not dispute, that the Company is currently profitable.

[7] Belardi-Ostroy also complains about its principals' compensation under the governing agreements, but that is not a basis for dissolution and is an issue the parties are litigating in the New Jersey action.

court. *See Auerbach v Bennett*, 47 NY2d 619, 630 (1979) (business judgment rule, in part, "is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments"); *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014), citing LLCL § 409; *see also Zuckerbrod v 355 Co., LLC*, 113 AD3d 675, 676 (2d Dept 2014). There is no authority that permits a non-controlling member to seek dissolution of an LLC on the ground that a disagreement over strategy exists (unless, of course, the operating agreement provides otherwise, which it does not in this case). *See 1545 Ocean*, 72 AD3d 129-30.

There are no grounds justifying dissolution of the Company at this juncture.[8] On the contrary, a Board meeting with the newly appointed fifth Director must be held and the parties must make good faith efforts to seek a viable path forward. To the extent the parties behave improperly – that is, if they breach the governing contracts or their fiduciary obligations – redress should be sought in the New Jersey court, not in this court. The judge in that case clearly understands the issues underlying the parties' disputes, and it is that judge the parties shall be accountable to. That said, as the New Jersey court itself recognized, the term of the fifth Director is only for one year [*see* Dkt. 76 at 27 (12/2/15 Tr. at 54)], and, hence, it is necessary to chart a more permanent, stable course forward. Uncertainty over the Company's future, however, does not mean it is not reasonably practicable to carry on the business.

Finally, while this court is the only court with jurisdiction to dissolve the Company, the parties are advised that further attempts to collaterally evade the lawful orders of the New Jersey

[8] It should be noted that, contrary to Belardi-Ostroy's contentions, the remedy of "equitable buyout" is unavailable when the petitioner fails to state a claim for dissolution under LLCL § 702. *See Kassab v Kasab*, 2016 WL 1125936, at *2 (2d Dept Mar. 23, 2016), citing *Mizrahi v Cohen*, 104 AD3d 917, 920 (2d Dept 2013) ("in certain circumstances, a buyout may be an appropriate equitable remedy **upon the dissolution of an LLC**") (emphasis added).

court may result in sanctions. It appears sanctions may well be on the table in New Jersey [*see* Dkt. 51 at 4 (1/22/16 Tr. at 7)], but this court will not opine on whether such sanctions are appropriate. That issue is left to the discretion of the able New Jersey court. Accordingly, it is

ORDERED that petitioner's motion for dissolution is denied and the cross-motion by respondent American List Counsel, Inc. to dismiss the petition of Belardi-Ostroy, Ltd. is granted, and the Clerk is directed to enter judgment dismissing the petition.

Dated: April 14, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C